IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-731

SUN OIL COMPANY, GENERAL CRUDE OIL COMPANY.
M. H. MARR, CONTINENTAL OIL COMPANY,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PHILADELPHIA GAS WORKS DIVISION OF UGI CORPORATION,
TEXAS EASTERN TRANSMISSION CORPORATION,
FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners herein respectfully petition this Court for an order (1) vacating its denial of their Petition for a Writ of Certiorari, entered February 23, 1976, and (2) granting said Petition. In support hereof, Petitioners state as follows:

I.

The Petition for a Writ of Certiorari was filed on November 18, 1975, and two answering briefs[1] had been filed by

[1] Respondent Texas Eastern Transmission Corporation takes no position regarding the conflict of decisions question (Question No. 1) and limits its opposition to the remaining question presented. Although Respondent Public Service Commission of the State of New York opposes certiorari on both questions, it does not address itself to the clear conflict between the decision of the court below and the decisions of this Court and the court of appeals for the Fifth Circuit presented by Question No. 1 of the Petition.

the time of the initial distribution of this case to the Court in late January. It was not until February 12, 1976, that Respondent Federal Power Commission (Commission) untimely filed its Memorandum in which it agrees that the questions presented by the Petition have merit and states further that these question do involve "public interest considerations" (Commission Memorandum, p. 8). Consequently, the Solicitor General, speaking for the Commission, does NOT oppose the granting of certiorari.

Petitioners were informed by the Clerk's office that this case had been placed on the Court's agenda for its conference of February 20, 1976. Therefore, following receipt of the Commission's belated Memorandum, Petitioners expeditiously filed their Reply Brief in response to all Respondents on February 17th, barely more than two days prior to the Court's conference.

Since the Commission agrees that both questions presented by the Petition have merit of public interest consequence and the other two Respondents either concede or do not directly contest the conflict of decisions questions (Question No. 1), Petitioners assume that certiorari was denied because of the Commission's view that the effect of the errors committed by the court below "appears to be limited to the peculiar facts of this case" and, therefore, will not "seriously interfere" with the performance of the Commission's regulatory responsibilities under the Natural Gas Act (Commission Memorandum, pp. 7, 8).

The late filing of the Commission's Memorandum and the necessarily subsequent filing of Petitioner's Reply Brief, occurring so proximately to the Court's February 20th conference, undoubtedly imposed an undue burden upon the Court. Petitioners have referred in their Reply Brief of February 17th to numerous other lease sales similar to the lease sale here involved which will in all likelihood con-

front the Commission with issues which the instant Petition seeks to resolve. In the circumstances caused by the late filing of the Commission's Memorandum, Petitioners respectfully submit that this situation may not have been fully appreciated either by the Court or the Commission.

II.

The sale of leaseholds by producers to interstate pipelines is not a unique or non-recurring situation. As noted in Petitioner's Reply Brief herein, one example of the far-reaching and recurring nature of such lease sales is presented by pending litigation before the Commission[1] and before the United States District Court for the Western District of Texas.[2] Both the above pending complaint before the Federal Power Commission and the suit before the Federal District Court affect 89 lease sale assignments by numerous producers, including two of the Petitioners,[3] of their gas leases in the San Juan Basin area of New Mexico. In those cases, the interstate pipeline buyers, California distribution customers, and California Public Utilities Commission are asserting that the assignments of leases by the producers to the pipelines constitute sales of natural gas subject to Commission regulation under this Court's decision in the Rayne case.[4] The San Juan lease sale agreements to El Paso were concluded in the early 1950s. After more than twenty years those lease sale agree-

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[1] *El Paso Natural Gas Company,* FPC Docket CP74-314 — Petition and complaint for order to show cause to assert FPC jurisdiction over lease sales to El Paso.

[2] *El Paso Natural Gas Co.* v. *Sun Oil Company, et al,* U.S.D.C., W.D. Tex. No. MO74-CA-57, formerly U.S.D.C., No. CA1761-73, et al, transferred to W.D. Tex. — Suit by El Paso to establish Commission jurisdiction over producers who had conveyed leases to El Paso.

[3] Continental Oil Company and Sun Oil Company.

[4] *United Gas Improvement Co.* v. *Federal Power Commission,* 381 U.S. 392 (1965).

ments are now being vigorously litigated on the question of Commission jurisdiction. If the jurisdictional claims are sustained, the Rayne conditioning procedure of lease sale certification at issue here will be of controlling effect.

In addition to the twenty-year-old San Juan lease sale agreements, there are many other cases of lease assignments by producers to interstate pipelines or distributors which may come before the Commission if they are determined to be jurisdictional. Even today, brand new agreements similar to the San Juan lease assignments are being negotiated in the same area of New Mexico to transfer gas reserves to a natural gas utility for resale in interstate commerce.[1]

A further example of conveyance of producing proved and developed gas leaseholds from a producer to an interstate pipeline is the case of *Tara Petroleum Corporation,* at FPC Docket No. CI75-337, which was decided by the Commission on February 25, 1976, subsequent to this Court's denial of certiorari. In *Tara,* the Commission issued an order permitting the producer to abandon its certificate covering the sale for resale of natural gas in interstate commerce to Kansas Nebraska Natural Gas Company from the Syracuse Field, Kansas. A condition of the producer's abandonment of its certificate was the conveyance of the producing, proved and developed gas leases to the interstate pipeline. The assignment of leases was made to continue the interstate sale for resale of the gas reserves involved.

The above cases illustrate the frequent instances of lease sales or assignment of natural gas reserves underlying gas

[1] Again, one of the petitioners in this case, Continental Oil Company, is involved in these negotiations which involve proposed conveyance of natural gas leases in the San Juan Basin to a natural gas utility, for transportation and resale in interstate commerce.

leases by producers to interstate pipelines for resale in interstate commerce. Such assignments of gas leaseholds are not limited to the instant Rayne case, and indeed are a recurring situation. The decisions of the court below and the Commission in conventionalizing such leasehold sales of gas reserves will be of increasing precedential importance.

III.

In their Petition filed November 18, 1975, Petitioners did not present as a separate question the larger issue of public interest involved in the overstepping by the court of appeals of the bounds of its reviewing authority in the course of the two erroneous actions of direct injury to Petitioners.

In the light of the Petition for Rehearing and Clarification of Respondent Federal Power Commission before the court of appeals, Petitioners were reasonably justified in expecting the Commission itself to carry forward its contentions that the choice of alternatives is essentially one for the administrative agency and that if error is found the court below may not impose upon the Commission a result which is not necessarily the only alternative available, citing *Federal Power Commission* v. *Idaho Power Company,* 344 U.S. 17 (1952) and related authority.

Contrary to Petitioners' expectation, the Commission did not here advance its public interest question. By its Memorandum of February 12th, filed shortly before the February 20th conference of this Court, the Commission expressly acknowledged that the court of appeals' decision was in error in directing the Commission to predicate refunds on a superseded rate, and in restricting the Commission's authority to determine the appropriate certificate condition extending payments for the life of the field (Commission Memorandum, pp. 5, 7 and 8).

After filing of the Petition herein, this Court authoritatively stated the limitations upon the power of the court of appeals to enter into the field of administrative discretion by the issuance on January 19, 1976, of its summary *per curiam* order in *Federal Power Commission* v. *Transcontinental Gas Pipeline Corp*, No. 75-584, ... U.S. ....., 44 USLW 3413, granting the petition for certiorari of the Commission, vacating the order of the court of appeals and remanding for further proceedings consistent with this Court's opinion.

In *Transcontinental,* the Commission had argued that the court of appeals overstepped the bounds of its reviewing authority in ordering an investigation by the Commission and in doing so had unwarrantedly interfered with the internal functional autonomy of an independent administrative agency. This Court agreed with that view in the following language:

"Third. We are of the view, however, that the Court of Appeals overstepped the bounds of its reviewing authority in issuing the order presently before us. First, we have consistently expressed the view that ordinarily review of administrative decisions is to be confined to 'consideration of the decision of the agency ... and of the evidence on which it was based.' United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-715 (1963). '[T]he focal point for judicial review should be the administrative record already in existence, not some new record initially made in the reviewing court.' Camp v. Pitts, 411 U. S. 138, 142 (1973). If the decision of the agency 'is not sustainable in the administrative record made, then the ... decision must be vacated and the matter remanded ... for further consideration.' Id., at 143. Clearly it is this mode of review that is contemplated by the statute providing for judicial review of Commission decisions, § 19(b) of the Act, 15 U.S.C. § 717r(b). Secondly, although we have recognized that a court reviewing decisions of the Federal

Power Commission sits as a court vested with equity powers and 'may authorize the Commission in proper circumstances to take new evidence', Mobil Oil Corp. v. FPC, 417 U.S. 283, 311-312 (1974), it is nevertheless true that ordinarily this will require a remand to the agency in order that it can exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops. Certainly this is the procedure contemplated by the review statute which provides that the Commission 'may modify its findings as to the facts by reason of the additional evidence so taken', and that such modified or new finding, '... if supported by substantial evidence, shall be conclusive....' 15 U.S.C. § 717r(b)." *id.* at 3414.

The belated Memorandum of the Solicitor General for the Commission in the present matter may have failed sufficiently to direct the attention of this Court to the persistence of the error of the court of appeals in its improper intrusion into the administrative function. In explanation of its failure consistently to protect the Commission's domain, the Memorandum takes the position that the court of appeals' decision would not "seriously interfere with the performance of its regulatory responsibilities under the Natural Gas Act" (Commission Memorandum, p. 8).

Aside from the cogent question of how seriously the improper arrogation of authority by the court below may injure Petitioners, the Commission was remiss in its failure to recognize the vigilance required of it to protect against improper judicial intrusion, regardless of the scope of the foray. The course of conduct should not depend upon whether the Commission thinks it can survive small, but not large, judicial assumptions. Petitioners respectfully submit that there is a matter of sufficient general interest

to the jurisprudence and the preservation of the proper bounds of administrative and judicial authority involved in the present case to justify the type of action taken by this Court in *Federal Power Commission* v. *Transcontinental Gas Pipeline Corp., supra,* by granting certiorari and remanding this case to the court of appeals for further consideration.

The Commission felt honor bound to make amends by suggesting that it might be right, after all, to grant the Petition as a matter in which more than private interests are affected, saying "Because we share petitioners' view of the merits, and because the questions presented implicate public interest considerations related to the outcome of this litigation, we do not oppose the granting of the petition for a writ of certiorari" (Commission Memorandum, p. 8).

CONCLUSION

Petitioners believe that it is clear that certiorari should be granted, for the reasons here presented, as well as those presented in their original Petition. Accordingly, Petitioners respectfully request the Court on rehearing to vacate its order of February 23, 1976, denying certiorari and to grant the Petition for writ of certiorari.

Respectfully submitted,

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March 11, 1976

CERTIFICATE OF COUNSEL

As counsel for the petitioner Continental Oil Company and on behalf of petitioners Sun Oil Company, M. H. Marr and General Crude Oil Company, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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TOM BURTON
Counsel for Petitioners

March 11, 1976